DOCKET NO. 85-1962

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

PAUL R. RIDDICK, JR., et al.,

Petitioners,

v.

THE SCHOOL BOARD OF THE CITY OF NORFOLK, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

JACK E. GREER, COUNSEL OF RECORD
J. A. STALNAKER
M. WAYNE RINGER
WILLIAMS, WORRELL, KELLY & GREER, P.C.
600 United Virginia Bank Building
Norfolk, Virginia 23510
(804) 624-2600

PHILIP R. TRAPANI
DANIEL R. HAGEMEISTER
908 City Hall
Norfolk, Virginia 23510
(804) 441-2871

Counsel for Respondents

TABLE OF AUTHORITIES

Case	Page
Dowell v. Bd. of Education of Oklahoma City Public Schools, (10th Cir. No. 85-1886).....	passim
Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).....	11
Riddick v. School Board of the City of Norfolk, 784 F.2d 521 (4th Cir. 1986).....	passim
Swann v. Charlotte Mechlenburg Bd. of Ed., 402 U.S. 1 (1971).....	6

DOCKET NO. 85-1962

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAUL R. RIDDICK, JR., et al.,

Petitioners,

v.

THE SCHOOL BOARD OF THE
CITY OF NORFOLK, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

Respondents submit this Supplemental Brief pursuant to Rule 22.6 and to comment on Petitioners' Supplemental Brief citing Dowell v. Bd. of Education

of Oklahoma City Public Schools, (10th Cir. No. 85-1886), decided on June 26, 1986 and not yet reported, but printed in the Appendix of Petitioners' Supplemental Brief and cited as creating a conflict between the Tenth and Fourth Circuits.

A comparison of the Dowell decision with the subject case of Riddick v. School Board of the City of Norfolk, Petitioners' Appendix, P 1a - 98a (hereinafter App.), 784 F.2d 521 (4th Cir. 1986), shows that they are not "squarely in conflict" in all of the areas contended by Petitioners.

Riddick was fully litigated on the merits in a three week trial with every issue raised by the Plaintiffs-Petitioners in contesting the constitutional aspects of the Norfolk School Board Plan and in urging the Court to

continue the 1971 "busing order" being addressed and decided by the trial and the appellate courts.

In contrast, the Dowell court in remanding to the trial court for additional factual determinations specifically stated that it addressed only the precise question of whether the trial court erred in denying plaintiffs' motion to reopen and confined its analysis to this narrow issue and its ". . . holding should not be construed as addressing, even implicitly, the ultimate issue of the constitutionality of the defendant's new school attendance plans . . .". Petitioners' Supplemental Appendix P. 4a and 34a (hereafter Supp. App.). The thrust of Dowell is that the trial court erred in holding a brief hearing supposedly only on plaintiff's right to reopen and challenge the

Oklahoma plan, but then deciding the merits of the plan itself without giving plaintiffs an opportunity to present evidence on the substantive issues (Supp. App. 9a, 10a, 26a, 31a, 32a).

Petitioners contend that there are four issues of critical importance in which the Fourth Circuit and Tenth Circuit are "squarely in conflict" (Supp. Brief P. 8 - 10).

As item one at page 8 of their brief, Petitioners contend that the Tenth Circuit has held that unitary status does not have the effect of terminating the responsibilities of the defendant to comply with the permanent injunction previously entered and not vacated by final order, and that the Fourth Circuit has held to the contrary. In assessing the accuracy of this contention, the trial court orders must be

looked to. While the "busing order" in Dowell might be construed as imposing a continuing obligation until a contrary order is entered, the terms of the Dowell order do not control the disposition of Riddick. The Dowell order specifically provided that "both present and future" Boards shall implement the Finger Plan and "shall not alter or deviate" from it "without the prior approval and permission of the court". In Riddick, the "busing order" in the predecessor Beckett/Brewer case simply ordered "that the plan of the School Board of the City of Norfolk, as amended, for the operation of the school for the system of the City of Norfolk for the year 1971 - 1972 is hereby approved". (Respondents' Appendix, p. 1.)1/

1/ By stipulation filed with the Riddick trial court it was agreed

Footnote Continued on Next Page

The Tenth Circuit viewed the decision of the Fourth Circuit as treating a unitary order "as dissolving a mandated integration plan despite the absence of a specific order to that effect" (Supp. App. 17a). This is an extreme and unwarranted view. Neither court in Riddick held, or even implied, that the unitary order was a dissolution or a dismantling of an integration plan. There is certainly a difference between such an extreme interpretation and the actual finding in Riddick in accord with the pronouncements of this Court in Swann v. Charlotte Mechlenburg Bd. of

---

Footnote Cont'd.

> that any orders, exhibits, transcripts or proceedings from the Beckett record could be offered into evidence without further proof, subject to rulings on admissibility. This order was not offered or printed in the record as no issue had been raised as to it.

Ed., 402 U.S. 1 (1971) and other cases that it is desirable that the operation of the school systems be returned to the school boards from the courts upon the systems becoming unitary.

The Riddick court specifically did consider whether the 1971 "busing order" should be continued in effect as contended by Petitioners and upon the evidence presented found that there was no constitutional requirement to do so. The Dowell court has simply ordered that the trial court on remand also consider whether, on the merits, the previous "busing order" should be continued in effect or the new proposed plan followed.

The "bridge" between the unitary order and voluntary compliance as characterized by Dowell (Supp. App. 17a) does not mean that a school board may

choose not to comply with the constitution, as the Riddick court made it clear that there must be such compliance.

Page 10 of the Supplemental Brief as the Petitioners' conflict item four states that the Dowell court held that it was not necessary for the plaintiffs to show that any changes in the busing plan were motivated by discriminatory intent and that the Fourth Circuit in Riddick ruled to the contrary. The Dowell court emphasized the injunctive nature of its "busing order", so as noted above, the question of the type of order and how that reflected the intention of the court must be considered, demonstrating the procedural decision that Dowell represents as opposed to the decision on the merits that Riddick represents. The crux of the matter is

whether a change in a school plan results in it being unconstitutional and the unitary status affected, i.e. whether discriminatory and, in turn, whether there was discriminatory intent. Until the merits are fully addressed and a determination made as to the constitutionality of the Oklahoma City plan (and the present Dowell opinion specifically notes that it did not even implicitly attempt to address this issue) then the effect, if any, of this seeming conflict cannot be fully assessed. It is respectfully submitted that the perceived conflict at least in the present posture of the cases is not such as to warrant the granting of certiorari.

Of the other two contentions of Petitioners, they say as conflict item two on page 8 of the Supplemental Brief, that the Tenth Circuit holds that the

purpose of a court ordered school integration plan is not only to achieve, but also to maintain a unitary school system, but that The Fourth Circuit held to the contrary in Riddick. This statement is not accurate. Riddick held that, as a result of unitary status, the school boards and not the federal courts will run the schools, but the decision made it very clear that a non-discriminatory desegregated system had to be maintained by the school board subsequent to any unitary order, and that the continuing unitary status subsequent to the unitary order could be questioned at any time by persons affected. The whole thrust of the Riddick case was whether the school system had remained unitary subsequent to the unitary order in 1975, was unitary at the time of trial in 1984 and would

remain unitary after implementation of the proposed plan.

Petitioners next say as conflict item three on page 9 of the Supplemental Brief that the Tenth Circuit recognizes the right of school children to challenge school board action which undoes a feature of the very desegregation plan that produced a unitary system, but that the Fourth Circuit rejected this. This also is inaccurate. The very heart of plaintiffs' claim in Riddick was that the court should enjoin respondents from making any change in the 1971 "busing order" and this claim was fully addressed by both courts. The Fourth Circuit did not misread or misapply Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) as contended by Petitioners in citing Dowell, but the findings in Riddick were

consistent and in accord with the reasoning of Spangler and the other cases, including Swann, decided by this Court on the subject.

Both Dowell and Riddick hold that the principle of res judicata and collateral estoppel prevented a challenge to or relitigation of the initial finding of unitary status, but this did not bar subsequent litigation challenging the unitary status because of any change in conditions or actions. They are also consistent in holding that parties who may be affected by any change which will or may affect a unitary status has the right to be heard. The difference is that in Riddick the plaintiffs were heard, but in Dowell they were not heard.

In the posture in which it stands before the Court, Riddick presents

constitutional issues. The Petition for Certiorari presents no question and makes no argument concerning the effects of mandatory injunctions. It argues constitutional issues in constituional terms with citation of school desegregation cases decided under the Fourteenth Amendment by this Court. Petitioners arguments below attacked the constitutionality of the Proposed Plan and the courts below decided this case on constitutional issues.

By contrast, the Tenth Circuit's decision does not reach these constitiutional issues. Dowell turns solely on the impact of a previous injunction decree and the petitioners' right to reopen. The Dowell court cites school desegregation cases by way of background, but the substance of its analysis employs case authorities

dealing with injunctions and not with the equal protection clause.

Thus, the only conflict between Riddick and Dowell is in the results at a procedural stage. No legal conflict is presented, since the theories under which the appeals were decided were totally different, Riddick turning on the Consititution and Dowell turning on equity procedure.

In summary, Dowell addressed only the narrow issue as to whether plaintiffs had a right to reopen and did not consider the constitutionality of the revised plan, but ordered a remand of the case for such consideration. Therefore, in its present procedural posture, Dowell is not a decision which creates a conflict of the circuits warranting the granting of a Writ of Certiorari. The Riddick trial court did hear evidence,

did consider the constitutional issue and did consider the effect on the unitary status as the Dowell trial court has now been instructed to do. Having considered and addressed each constitutional issue, the Riddick court found that there was no constitutional violation.

For the reasons set forth herein and in Respondents' Brief In Opposition To Petition For Certiorari, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

THE SCHOOL BOARD OF THE CITY OF NORFOLK, et al.

By: Jack E. Greer
Of Counsel

Jack E. Greer, Counsel of Record
J. A. Stalnaker
M. Wayne Ringer
WILLIAMS, WORRELL, KELLY & GREER, P.C.
600 United Virginia Bank Building
Post Office Box 3416
Norfolk, Virginia 23514
(804) 624-2600

Philip R. Trapani
Daniel R. Hagemeister
908 City Hall Building
Norfolk, Virginia 23510
(804) 441-2871

CERTIFICATE

I hereby certify that on this 2nd day of September, 1986, three copies of the foregoing were mailed, postage prepaid, to:

Julius LeVonne Chambers, Esq.
99 Hudson Street
16th Floor
New York, New York 10013

All parties required to be served have been served.

Jack E. Greer

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

LEOLA PEARL BECKETT, ET AL.,

Plaintiffs,

v.

CIVIL ACTION

NO. 2214

THE SCHOOL BOARD OF
THE CITY OF NORFOLK, ET AL.,

Defendants.

O R D E R

This day came on again to be heard upon the Plan of the School Board of the City of Norfolk for the operation of the school system in the City of Norfolk for the year 1971-1972, and the objections thereto of the plaintiffs and the plaintiff-intervenor, United States of America, and upon objections filed thereto by the defendants-intervenors; upon the evidence produced and heard at

the hearings with regard thereto; upon the balance of the entire record in this case, including all prior proceedings and all Orders, Memoranda Opinions, reports, exhibits and papers filed; and upon arguments of counsel.

Upon consideration whereof and for the reasons set forth in the Memorandum Opinion of this Court filed July 28, 1971, which shall be considered as Findings of Fact and Conclusions of Law for the purpose of Rule 52 of the Federal Rules of Civil Procedure, it is

ADJUDGED, ORDERED and DECREEED

(1) That the Plan of the School Board of the City of Norfolk, as amended, for the operation for the school system of the City of Norfolk for the year 1971-1972 is hereby APPROVED.

(2) That the objections thereto of the plaintiffs,

plaintiff-intervenors, and defendants-intervenors, are DENIED.

(3) That the plaintiffs' motion for counsel fees to be taxed as cost is DENIED.

(4) That this cause shall be continued on the docket of this court.

(signed) John A. MacKenzie

United States District Judge

Norfolk, Virginia

July 28, 1971